IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 29.11.2007
CORAM

THE HON'BLE MR. JUSTICE S.MANIKUMAR

W.P.No.21229 of 2006

V.Mani ... Petitioner

vs

The Secretary to Government,
State of Tamil Nadu,
Revenue Department,
Fort St. George, Chennai-9. ... Respondent

This petition came to be numbered by transfer of O.A.No.1984 of 2003 on the file of the Tamil Nadu Administrative Tribunal praying for the issuance of a Writ of Certiorarified Mandamus, to set aside the impugned order No.G.O.(Permanent) 91 Revenue Services/1-2 Department, dated 18.02.2003 of the respondent, in so far as it denies to the petitioner the pay and allowances for the period from 01.05.1997 to 31.05.1998 and consequently, direct the respondent to grant arrears of pay and allowances for the period from 01.05.1997 to 31.05.1998 with interest to the petitioner within the specified time.

For Petitioner ... Mr.Karthick Rajan

For Respondent ... Mrs.Lita Srinivasan,
Government Advocate

ORDER
The petitioner, a former Deputy Collector of the Revenue Department, Chennai, has challenged the order of the Government in G.O.(Permanent) 91 Revenue Services/1-2 Department, dated 18.02.2003, by which, his pay and allowances for the period preceeding his retirement, due to change in the date of birth was denied and consequently, prayed for a direction to the respondent to grant arrears of salary and allowances for the period from 01.05.1997 to 31.05.1998 with interest within the time limit and further orders.

2. Brief facts leading to the Writ Petition are as follows:
The petitioner entered the Government service in the year 1958. At the time of entry, his date of birth was entered as 18.04.1939. But the correct date of birth is 24.05.1940. The petitioner therefore submitted an application dated 21.05.1991 to the respondent for alteration of date of birth and the same was also recommended by the Commissioner of Revenue Administration, Chennai. Inspite of recommendations, the petitioner's request for alteration of date of birth was rejected on 22.01.1997. Aggrieved by the same, the petitioner filed O.A.No.1667 of 1997, before the Tamil Nadu Administrative Tribunal. The Tribunal by order dated 01.10.1997, allowed the Original application and directed the respondent to examine the matter afresh and pass orders on merits within 12 weeks from the date of receipt of passing of the order. After a delay of five years, the respondent, by order dated 18.10.2003, passed orders altering the date of birth of the petitioner from 18.04.1939 to 24.05.1940. In the meanwhile, the petitioner retired from service on 30.04.1997, on attaining the

age of superannuation, as per the date of entry in the service record, viz., 18.04.1939. While altering the date of birth, the respondent has denied the salary and other benefits for the period between 01.05.1997 and 31.05.1998 (notional promotion) on the principle of "No Work No Pay". Aggrieved by the order of the respondent, the petitioner has preferred another Original Application before the Tamil Nadu Administrative Tribunal, which was subsequently, transferred to this Court and renumbered as Writ Petition.

3. Before the Original Application was transferred to this Court, by order dated 20.04.2004, the Accountant General (Accounts and Entitlement) Tamil Nadu, Chennai, directed the Treasury Officer, Nagapattinam, to recover the pension and Dearness Allowances already paid to the petitioner for the period from 01.05.1997 to 31.05.1998. Pending disposal of the above Original Application, the petitioner has taken out a Miscellaneous application in M.A.No.1462 of 2004 before the Tribunal for interim injunction restraining the respondent from recovering the pension paid for the period from 01.05.1997 to 31.05.1998. The Tribunal, while setting aside the order of the Accountant General dated 20.04.2004, passed the following orders:
"The order of recovery appears to be ridiculous. If he is not entitled for pay for the extended period, he will be eligible for pension. If he is entitled for salary for the extended period, the amount of pension can be adjusted. Therefore, there is no meaning in the order passed by the Accountant General and order of recovery dated 20.04.2004 is therefore, set aside."

4. Mr.Karthick Rajan, learned counsel for the petitioner submitted that the impugned order, denying pay and allowance for the period from 01.05.1997 to 31.05.1998 to the petitioner, is arbitrary, illegal and violative of Articles 14 and 16 of the Constitution of India. He further submitted that when the application for alteration of date of birth was filed as early as on 21.05.1991, the respondent took nearly 6 = years to reject the application. According to him, had the respondents dealt with the application promptly in accordance with law, by accepting the recommendations of the Commissioner of Revenue Administration, Chennai, delay would not have occurred, that the petitioner would have continued in services upto 31.05.1998, as per the revised date of birth and therefore, it is not open to the respondent to take advantage of their own default and reject the claim of the petitioner on the principle of "No work no pay". He further submitted that when the petitioner was illegally prevented from discharging his duties by the conduct of the respondents, the question of "No work no pay" will not arise and therefore, the petitioner is entitled to pay and other allowances for the above said period. In support of his contention, learned counsel for the petitioner placed reliance on the following decisions:

i)Union of India v. K.V.Janakiraman, reported in AIR 1991 SC 2010 .
ii)Burn Standard Co. Ltd., and another v. Tarun Kumar Chakraborthy and others reported in 2003 SCC (L & S) 1015.
iii)Srikantha S.M. v. Bharath Earth Movers Ltd., reported in 2005 (8) SCC 314,
iv)Punjab SEB v. Kuldip Singh reported in 2005 (13) SCC 362
v)State of Kerla v. E.K.Bhaskaran Pillai reported in 2007 (6) SCC 524
vi)Munivenkatappa v. State Bank of India reported in 2007 (2) CTC 135
5. Per contra, Mrs.Lita Srinivasan, learned Government Advocate, on instructions, submitted that as per the entry in the service record, the date of birth of the petitioner was 18.04.1939. As the request of the petitioner for alteration of date of birth from 18.04.1939 to 20.04.1940 was rejected by the Government in G.O.1D.No.37, Revenue, dated 22.01.1997, he was permitted to retire on 30.04.1997. She further submitted that the rejection order was challenged by the petitioner in O.A.No.1677/1997 before the Tamil Nadu Administrative Tribunal, Chennai and by order dated 11.10.1997, the Tribunal was pleased to set aside the above Government Order and directed the respondent to examine the representation of the petitioner with reference to the procedure laid down in Rule 49(a) of the Tamil Nadu State and Subordinate Service Rules and pass orders on merits. Aggrieved by the

same, the respondent has preferred a Writ Petition in W.P.No.3889 of 1998 and this Court, by order dated 23.03.1998, dismissed the petition with an observation that it is open to the respondent to examine the claim of the petitioner on merits. After consulting the Tamil Nadu Public Service Commission, the Government have issued orders in G.O.Ms.No.91-Revenue (Ser.1(2) Department, dated 18.02.2003, altering the date of birth of the petitioner from 18.04.1939 to 24.05.1940. Referring to the sequence of events, she submitted that the department was pursuing its remedy before this Court and there was no undue delay.

6. Learned Government Advocate further submitted that as per the altered date of birth, the petitioner is deemed to have been retired on 31.05.1998 and therefore, sanction was accorded by the Government to give due notional increment and revise the pensionary benefits. Since the petitioner was not in actual service for the period between 01.05.1997 and 31.05.1998, he is not entitled to arrears of salary and other monetary benefits.

7. Referring to the order of the Tribunal made in O.A.No.1667 of 1997, dated 01.10.1997, learned counsel for the State submitted that the direction given by the Tribunal was only to examine the application of the petitioner and not to provide re-employment, in the event of alteration of date of birth and therefore, the petitioner is not entitled to the arrears of salary. Placing reliance on the decision in Baldev Singh v. Union of India reported in 2005 (8) SCC 747, she submitted that the petitioner is not entitled to arrears of salary and other monetary benefits for the period, as he was not in actual service.

8. Heard Mr.Karthick Rajan, learned counsel for the petitioner as well as Mrs.Lita Srinivasan, learned counsel for the respondent.

9. Pleadings disclose that the petitioner has entered the Government Service in 1958 and coming to know of his correct date of birth, made an application to the respondent for alteration of date of birth, which was also recommended by the Commissioner of Revenue Administration, Chennai. A perusal of the judgment in O.A.No.1667 of 1997, dated 01.10.1997, reveals that the Government in G.O.Ms.395, P & AR (PER.S) Department, dated 16.12.1992, introduced a proviso to Rule 49(c) of the Tamil Nadu State and Subordinate Service Rules to the effect that the application for alteration of date of birth of a person, who entered the service prior to 24.01.1961 can be entertained provided it is submitted atleast one year before the date of his retirement, reckoned with reference to the Official records. It is further evident that on receipt of the judgment of the Supreme Court dated 03.08.1994, in C.A.No.5422 of 1994, the proviso to Rule 49 (c) was deleted by the government with retrospective effect from 03.08.1994 by G.O.Ms.No.388, (P & AR), dated 27.12.1995. Admittedly, the petitioner has submitted his application on 24.05.1991, prior to the amendment and having regard to the fact that he was due to retire on 31.10.1997, as per the official records, this application ought to have been considered without reference to the amendment. But the respondent has misapplied the judgment of the Supreme Court and the Government Order in G.O.Ms.No.388, (P & AR), dated 27.12.1995 and rejected the claim of the petitioner on 22.01.1997.

10. The rejection order issued in G.O.1D.No.37, Revenue, dated 22.01.1997, was set aside and the Tribunal directed the respondent to consider the application of the petitioner with reference to the procedure laid down in Rule 49(a) of the Tamil Nadu State and Subordinate Service Rules and pass orders on merits. The Writ Petition filed against the order of the Tribunal was also dismissed by this Court. In the above factual background, the question to be decided is whether the petitioner was illegally prevented from discharging his duties and if so, whether he is entitled to arrears of pay and other monetary benefits.

11. The decisions relied on by the learned counsel for the petitioner are briefly dealt with hereunder:

(i) The Supreme Court in Union of India v. K.V.Janakiraman, reported in 1991 SC 2010 , in Paragraph 7 of the judgment, held as follows:
"The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R.17(1) will also be inapplicable to such cases."

At this juncture, it is relevant to extract Section 17(1) of the Fundamental Rules.
"Subjects to any exceptions specifically made in these rules and to the provision of sub-rule (2), an officer shall begin to draw the pay and allowances attached to his tenure of a post with effect from the date when he assumes the duties of that post, and shall cease to draw them as soon as he ceases to discharge those duties:

Provided that an officer who is absent from duty without any authority shall not be entitled to any pay and allowances during the period of such absence."
(ii) In Burn Standard Co. Ltd., and another v. Tarun Kumar Chakraborthy and others reported in 2003 SCC (L & S) 1015, the first respondent therein was kept out of service and not permitted to work. The appellants contended that due to pendency of a case filed by the association, they bona fide believed that they could not permit him to join duty. The Supreme Court accepting the contention of the respondent therein, employer held that if there was no impediment in law in permitting the employee in joining the duty, then there is no justification in denying the salary to him. Accordingly, the Court, directed the appellant to pay the salary and other emoluments for the period not covered by the litigation and interim orders.

(iii) In Srikantha S.M. v. Bharath Earth Movers Ltd., reported in 2005 (8) SCC 314, an employee submitted his resignation to relieve him from duties as per the Rules. The employer-company accepted his resignation on the same day and directed him to be relieved with "immediate effect". However, on the same day, the Company granted him Casual Leave from 05.01.1993 to 13.01.1993 and 14.01.1993 being a holiday, informed him that he would be relieved by the close of working day, i.e., on 15.01.1993. In the evening of that day, the company relieved him. However, before that day, the employee sent a letter to the Company, withdrawing his resignation. The Supreme Court, in such circumstances, held that the employee remained in service upto the postulated day and the company was bound to give effect to the withdrawal of resignation.

In the above reported judgment, the employee was not allowed to work after the postulated day and therefore, he filed a Writ Petition, challenging the action of the employer, relieving him from service. The employee contended that the resignation had already been withdrawn and therefore, he should be permitted to continue in service. The Writ Petition was dismissed, on appeal, the Division Bench also concurred with the view of the learned Single Judge. On further appeal, the Supreme Court reversed the decision of the High Court and held that the employee had withdrawn his resignation before it was given effect to by the Employer and therefore, granted the relief prayed for, by the employee. As regards backwages, the Company contended that since the employee did not work for the later period, he would not be entitled to salary on the principle of "No work No pay". Rejecting the submission made on behalf of the Company, the Supreme Court at Paragraph 29 of the judgment held as follows:

"We must frankly admit that we are unable to uphold the contention of the respondent company. A similar situation had arisen in J.N.Srivastava and a similar argument was advanced by the employer. The Court, however, negatived the argument observing that when the workman was willing to work but the employer did not allow him to work, it would not be open to the employer to deny monetary benefits to the workman who was not permitted to discharge his duties. Accordingly, the benefit

were granted to him. In Shambhu Murari Sinha II also, this Court held that since the relationship of employer and the employee continued till the employee attained the age of superannuation he would be entitled to "full salary and allowances" of the entire period he was kept out of service. In Balram Gupta inspite of specific provision precluding the government servant from withdrawing notice of retirement this Court granted all consequential benefits to him. The appellant is, therefore, entitled to salary and other benefits."

(iv) In Punjab SEB v. Kuldip Singh reported in 2005 (13) SCC 362, the Supreme Court considered the case of Junior Engineer, who was not promoted to the post of Assistant Engineer (AE) by the State Electricity Board, as he had not taken the departmental examination. Subsequently, he passed the examination. One S was appointed as Assistant Engineer and his appointment was made subject to the rights of a candidate who may be appointed in regular course. When the said Junior Engineer (respondent therein) acquired qualifications after passing the departmental examination, neither S was reverted nor the respondent was promoted as Assistant Engineer. However, S preferred a suit, in which, interim injunction was granted restraining the State Electricity Board from reverting him to the post of Junior Assistant. Ultimately the suit came to be dismissed. On the Writ Petition filed by the respondent, the High Court directed the Electricity Board to decide the dispute on merits. Thereafter, the respondent was promoted to the post of Assistant Engineer with effect from 14.12.2001, instead of 20.03.1990, being the date, he had passed the departmental examination. A second Writ Petition was filed by the respondent, claiming notional promotion with effect from 20.03.1990 with all backwages and consequential benefits with interest at the rate of 18% until the payment was made. Before the High Court, the State Electricity Board contended that the respondent was not entitled to notional promotion or backwages for any period prior to 2001, as the number of posts had been reduced by way of amendment to the Rules. The second Writ Petition was also allowed and the High Court directed the Electricity Board to create a supernumerary post and pay all arrears of salary together with interest at the rate of 9% within two months from the date of passing of the order. On appeal, the Supreme court declined to accept the contention of the State Electricity Board and allowed the appeal only to the extent of rate of interest.

(v) In State of Kerala v. E.K.Bhaskaran Pillai reported in 2007(6) SCC 524, the Supreme Court, while deciding the correctness of the judgment of the Kerala High Court, directed that the respondent therein would be entitled to higher pay on account of retrospective promotion. At Paragragh 4 of the judgment, the Supreme Court held as follows:
"So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various facts which have to be considered. Sometimes in a case of departmental enquiry or in criminal case it depends on the authorities to grant full backwages or 50 per cent of back wages looking to the nature of delinquency involved in the matter or in the criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes, in the matter when the person in superseded and he has challenged the same before Court or Tribunal and he succeeds in that and direction is given for reconsideration of his case the Court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard-and-fast rule. The principle "no work no pay" cannot be accepted as a rule of thumb. There are exceptions where courts have granted monetary benefits also."

In the above reported case, persons junior to the respondent therein were promoted to the higher post, whereas, he was wrongly denied promotion. Thereafter, he was promoted with retrospective effect, without pay on the basis of "No work no pay". Learned Single Judge refused to grant him monetary benefits in the promotional post with retrospective effect. In the Review application,

benefit was given from the date, when he filed the Original Application in the High court, i.e., 15.06.1992.

(vi) A Division Bench of this Court in Munivenkatappa v. State Bank of India, reported in 2007 (2) CTC 135, considered a case where the request of the appellant therein for voluntary retirement was unilaterally treated as resignation and by applying the principle of "No work No pay", the employer refused to give him the monetary benefits. The Division Bench of this Court at Paragraph 12, held as follows:
"Once it is found that the decision of the respondents is illegal, it has to be held that the respondents have illegally prevented the petitioner from discharging his duties from 01.10.1999 and if the respondent's illegally prevented the petitioner from attending to the duties, respondents are bound to pay salary fro the period for which the petitioner was not allowed to perform his duties."

12. In the decision cited by the learned Government Advocate for the State in Baldev Singh v. Union of India, reported in 2005(8) SCC 747, the appellant was an Army man, arrested and convicted for an offence punishable under Section 302/34 and 452 I.P.C. On appeal, he was acquitted by the High Court on 26.03.1992. He was released from jail on 04.04.1992 and reported to his Unit on the next day along with the copy of the judgment and he was reinstated. On the strength of his acquittal and continuity of service, the appellant therein claimed backwages and monetary benefits for the above said period and also prayed for pension. The High Court declined to grant relief as prayed for. On appeal, the Supreme Court at Paragraph No.7, held as follows:
"As the factual position noted clearly indicates, the appellant was not in actual service for the period he was in custody. Merely because there has been acquittal does not automatically entitle him to get salary for the period concerned. This is more so, on the logic of no work no. It is to be noted that the appellant was terminated from service because of the conviction. Effect of the same does not get diluted because of subsequent acquittal for the purpose of counting service."

13. The legal principles which emerge from the decisions cited supra are that the normal rule of "No work, No pay" is not applicable to cases where the employee although was willing to work, is kept away from work by the authorities for no fault of him. The principle of "No Work No Pay" cannot be accepted as a Rule of Thumb, in a case where the administration has wrongly denied his due, the Government servant/employee should be given the benefits, as per the Fundamental Rules, including monetary benefits, subject there being any change in law or some supervening factors. As held by the Division Bench in Munivenkatappa's case, once it is found that the decision of the respondent is illegal, it has to held that the respondents have illegally prevented the employee from discharging his duty and consequently he is entitled to the emoluments for the period for which he was not allowed to perform his duties. In all these decisions, the Apex Court as well as this Hon'ble Court have held that if the government servant or employee is denied of a benefit or deprived of his legitimate right due to the fault of the department/employer, then the government servant/employee should not be made to suffer, but for specific circumstances, such as change in law or some supervening circumstances.

14. In the case on hand, the petitioner has made an application on 21.05.1991 for alteration of his date of birth from 24.05.1940 to 18.04.1939. In spite of recommendations from the Commissioner of Revenue Administration, Chennai, his request for alteration was rejected on 22.01.1997. Though the Tribunal by order dated 01.10.1997 allowed the Original Application No.1677 of 1997 and directed the respondent to examine the matter afresh and pass orders on merits, the Government had taken more than five years in issuing the order in No.G.O.(Permanent) 91 Revenue Services/1-2 Department, dated 18.02.2003, altering the date of birth from 24.05.1940 to 18.04.1939. In the meanwhile, the petitioner had retired from service on 30.04.1997, on attaining the age of superannuation. Had the department considered the case of the petitioner by applying correct

principles of law, in dealing with the application for alteration of date of birth of those persons who entered the service before, 24.01.1961, and passed orders promptly without any delay, by considering the recommendations of the Commissioner of Revenue Administration, Chennai, the petitioner would have continued in service till 31.05.1998 and drawn his salary, earned his promotion, if any, and other monetary benefits.

15. Having accepted that date of birth of the petitioner as 18.04.1939 and directed the authorities to make necessary correction, the department instead of merely applying the principle of "No work No Pay" ought to have considered, whether the delay on their part in considering the application dated 21.05.1991, the ultimate decision taken by them, had prevented the government servant from discharging his duties. On consideration of the facts and circumstances of this case, I am of the considered view that though the petitioner was willing to work, he was kept away by the department by erroneously approaching the issue of alteration of date of birth, which has been held proved by the decision of the Tribunal and confirmed by this Court and thereby he was prevented from working till 31.05.1998. The respondent cannot take advantage of this error and deny the legitimate salary and other emoluments.

16. The decision relied on by the learned Government Advocate for the State in Baldev Singh v. Union of India reported in 2005 (8) SCC 747, has no application to the facts of this case, as the appellant therein was not prevented from discharging his duties, but he was convicted and was in custody.

17. For the above reasons, the impugned order is set aside and the petitioner is entitled to arrears of salary and allowances for the period from 01.05.1997 to 31.05.1998. The respondents are directed to sanction and disburse the same and also revise the pension, within twelve weeks from the date of receipt of a copy of this order.

18. In the result, the Writ Petition is allowed. No costs.

29.11.2007
INDEX: Yes
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S. MANIKUMAR, J.

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To
The Secretary to Government,
State of Tamil Nadu,
Revenue Department,
Fort St. George, Chennai-9.

29.11.2007